MIDF Amanah Ventures Sdn Bhd v Lim Thiam Chye

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-439–12 OF 2016
KHADIJAH IDRIS JC
16 MARCH 2018

Civil Procedure — Specific performance — Application for specific performance — Whether put option exercised within put option period — Whether plaintiff not entitled to execute put option notice after expiry of put option period — Whether put option price unjust and oppressive — Whether fixed deposit rate high — Rules of Court 2012 O 81 r 1

On 13 March 2007 the plaintiff and a company known as BTS Holdings (M) Sdn Bhd ('BHSB') entered into a subscription agreement ('the subscription agreement') where the plaintiff agreed to subscribe for 500,000 redeemable convertible cumulative preference shares of RM1 each in the share capital of BHSB ('the subscription shares') at a subscription price of RM10 only for each share and the total subscription price of RM5m ('the subscription price') subject to the terms and conditions contained therein. The plaintiff then subscribed for the subscription shares for the subscription price in accordance with the terms and conditions set out making the plaintiff the legal and beneficial owner of the subscription shares. The plaintiff and the defendant then entered into a put and call option agreement ('the put and call option agreement'). On or about 4 January 2011, the plaintiff exercised the put option by serving a notice in writing of such exercise on the defendant in accordance with the provisions of the put and call option agreement. By way of the put option notice dated 4 January 2011 ('the put option notice'), the plaintiff informed the defendant that he was required to purchase the option shares from the plaintiff at the put option price of RM9,835,349 wherein completion of the purchase was to take place on 25 January 2011. However, the defendant failed to purchase the option shares from the plaintiff which led to the plaintiff filing this proceeding.

Held, allowing the plaintiff's application with costs of RM6,000:

(1) Under the circumstances, the defendant's contention that the exercise of the put option by the plaintiff was subject to the occurrence of an event of default was a misconstruction. There was no provision in the put and call option agreement which required the put option notice to be enforced within the put option period. All that was required was by serving a written notice of such desire to exercise the put or call option on the other party within the specific put option period or call option period

as the case may be. The defendant's contention that the plaintiff was not entitled to execute the put option notice after the expiry of the put option period was a non-issue. The defendant's contention was purely devoid of merits as the parties had contemplated that the completion of the sale and purchase of the option shares might occur beyond the put option period or the call option period (see paras 33, 40 & 47).

(2) The put and call option agreement had to be interpreted in a sensible commercial manner to give effect to the intention of the parties. An unreasonable result would have been achieved if the put option was interpreted in the manner contended by the defendant as the could deliberately and intentionally refuse, fail and neglect to honour his part of the bargain to purchase the option shares within the put option period and after the expiry of such period, use this against the plaintiff (see para 43).

(3) As the determination of the put option price had been mutually pre-determined by the plaintiff and defendant, the defendant could not claim that the sum of RM9,835,349 which was calculated based on the pre-determined formula was excessive. It was considered that the issue of unjust and oppressive and the sum RM9,835,349 being excessive was without basis (see paras 55–56).

(4) The defendant's complaint that the rate 3.2%pa was high was not supported by any facts or evidence. In the absence of such evidence there was no reason for this court to doubt the rate obtained from the regulatory body. The formula to determine the rate had already been agreed by the parties. The plaintiff was not entitled to impose interest at the rate of 3.2%pa on the sum of RM9,835,349 as the computation of the put option price was inclusive of 25% dividend on the subscription price and it would be unjust on the defendant. The interest rate at 3.2%pa ought to be imposed on the damages suffered because of the defendant's breach of the put and call option agreement (see paras 60–62).

[Bahasa Malaysia summary

Pada 13 Mac 2007, plaintif dan satu syarikat dikenali sebagai BTS Holdings (M) Sdn Bhd ('BHSB') telah menandatangani satu perjanjian langganan ('perjanjian langganan tersebut') di mana plaintif telah bersetuju untuk melanggan 500,000 saham pilihan kumulatif boleh ubah bernilai RM1 setiap satu sebagai modal saham BHSB ('langganan saham tersebut') pada harga langganan berjumlah hanya RM10 untuk setiap saham dan jumlah keseluruhan langganan sebanyak RM5 juta ('harga langganan tersebut') tertakluk pada terma dan syarat yang telah dinyatakan. Plaintif kemudiannya telah melanggan saham langganan untuk harga langganan berdasarkan terma dan syarat yang membolehkan plaintif menjadi pemilik undang-undang dan

berfaedah saham langganan tersebut. Plaintif dan defendan kemudiannya telah menjalinkan satu perjanjian pilihan jual dan beli ('perjanjian tersebut'). Pada 4 Januari 2011, plaintif telah mengunakan pilihan untuk menjual dengan menyampaikan notis bertulis. Berdasarkan notis yang dibuat pada 4 Januari 2011 ('notis tersebut'), plaintif memaklumkan defendan supaya membeli saham pilihan daripada plaintif pada harga RM9,835,349 di mana pembelian saham tersebut dibuat pada 25 Januari 2011. Walau bagaimanapun, defendan gagal membeli saham tersebut daripada plaintif yang menyebabkan plaintif mengambil tindakan dalam prosiding ini.

Diputuskan, membenarkan permohonan plaintiff dengan kos RM6,000:

(1) Berdasarkan situasi, dapatan defendan yang mengatakan plaintif hanya boleh mengunakan pilihan untuk menjual sekiranya ada kegagalan adalah salah. Tidak ada dalam perjanjian pilihan jual dan beli yang mengatakan notis pilihan untuk membeli hanya boleh digunakan dalam tempoh pilihan untuk menjual. Yang diperlukan adalah hanya untuk menyampaikan satu notis bertulis menyatakan keinginan untuk mengunakan pilihan jual dan beli pada masa-masa tertentu. Hujahan defendan yang mengatakan plaintif tidak berhak untuk melaksanakan notis pilihan untuk menjual selepas tamat tempoh pilihan untuk menjual bukanlah satu isu. Hujahan defendan adalah tidak bermerit disebabkan pihak-pihak telah bersetuju mengatakan jual beli saham pilihan boleh berlaku melebihi tempoh pilihan untuk menjual atau tempoh pilihan untuk membeli (lihat perenggan 33, 40 & 47).

(2) Perjanjian pilihan jual dan beli hendaklah diterjemahkan dalam bentuk komersial untuk menentukan kehendak pihak-pihak. Satu hasil yang tidak munasabah akan dicapai sekiranya pilihan untuk menjual diterjemahkan seperti mana yang dihujahkan defendan yang secara sengaja gagal untuk membeli saham pilihan dalam tempoh pilihan untuk menjual dan selepas tamat tempoh tersebut terhadap plaintif (lihat perenggan 43).

(3) Disebabkan harga pilihan untuk menjual sebelum ini telahpun dipersetujui oleh plaintif dan defendan, defendan tidak berhak untuk mengatakan jumlah RM9,835,349 adalah satu jumlah yang berlebihan. Adalah diputuskan bahawa anggapan yang mengatakan jumlah tersebut adalah tidak adil dan menekan adalah tidak benar (lihat perenggan 55–56).

(4) Aduan defendan yang mengatakan kadar tahunan sebanyak 3.2% adalah tinggi tidak disokong oleh apa-apa fakta dan bukti. Disebabkan tiadanya bukti tersebut, mahkamah tidak mempunyai sebab untuk meragui kadar tersebut. Formula untuk menentukan kadar tersebut telah dipersetujui oleh kedua-dua pihak. Plaintif tidak berhak untuk mengenakan faedah pada kadar 3.2% untuk jumlah keseluruhan RM9,835,348 sebagai

penaksiran harga pilihan untuk menjual termasuk dividen sebanyak 25% pada harga langganan dan ianya tidak adil kepada defendan. Kadar faedah sebanyak 3.2% dikenakan adalah disebabkan ganti rugi yang dialami kesan daripada pelanggaran perjanjiian pilihan jual dan beli oleh defendan (see paras 60–62).]

Notes

For cases on application for specific performance, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8866–8868.

Cases referred to

L Schuler A G v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39; [1974] AC 235, HL (refd)

Lee Hoy & Anor v Chen Chi [1971] 1 MLJ 76, FC (refd)

Perbadanan Nasional Berhad v Arif bin Awang [2011] MLJU 125, HC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd [1994] 1 MLJ 239; [1994] 2 CLJ 301, HC (refd)

The Government of Malaysia v Imej Warisan Sdn Bhd [2018] 2 MLJ 791; [2017] 1 LNS 1914, CA (refd)

Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585; [2008] 2 CLJ 303, CA (refd)

Legislation referred to

Companies Act 1965

Rules of Court 2012 O 14, O 81, O 81 r 1, 1(2)

Specific Relief Act 1950 s 18(1)

Anita Sockalingam (Raneesha Thayalan with her) (Zain & Co) for the plaintiff.
Kartini Yusoff (Emma & Azimah) for the defendant.

Khadijah Idris JC:

INTRODUCTION

[1] The plaintiff's application for specific performance under O 81 r 1 of the Rules of Court 2012 ('the RoC 2012') was allowed by this court. Aggrieved by the said decision, the defendant filed this appeal.

PARTIES

[2] The plaintiff is a private company incorporated in Malaysia under the provisions of the Companies Act 1965 with its registered address at Level 21, Menara MIDF, 82 Jalan Raja Chulan, 50200 Kuala Lumpur.

[3] The defendant, Lim Thiam Chye, is an individual has an address for service at No 18-C, Jalan Glugor, Kampung Baru, 08000 Sungai Petani, Kedah Darul Aman and/or at No 8, Jalan Teratai 1/1, Amanjaya, 08000 Sungai Petani, Kedah Darul Aman.

FACTUAL BACKGROUND

[4] On 13 March 2007 the plaintiff and a company known as BTS Holdings (M) Sdn Bhd ('BHSB') entered into a subscription agreement ('the subscription agreement'). By the subscription agreement the plaintiff agreed to subscribe for 500,000 redeemable convertible cumulative preference shares of RM1 each in the share capital of BHSB ('the subscription shares') at a subscription price of RM10 only for each share and the total subscription price of RM5m ('the subscription price') subject to the terms and conditions contained therein.

[5] Also on 13 March 2007 a shareholders agreement was entered into between the plaintiff, BHSB, the defendant and one Leong Soek Fun to, inter alia, regulate their relationship inter se as shareholders of BHSB. By way of a supplemental shareholders agreement dated 15 April 2016, the parties agreed to amend, vary and/or alter certain terms of the shareholders agreement dated 13 March 2007 as set out therein. The shareholders agreement dated 13 March 2007 and the supplemental shareholders agreement dated 15 April 2016 are hereinafter collectively referred to as 'the shareholders agreements'.

[6] The plaintiff then subscribed for the subscription shares for the subscription price in accordance with the terms and conditions set out therein making the plaintiff the legal and beneficial owner of the subscription shares.

[7] On or about 13 March 2007, the plaintiff and the defendant entered into a put and call option agreement (the put and call option agreement). The put and call option agreement provided, inter alia, as follows:

(a) in consideration of the plaintiff, at the request of the defendant, entering into the subscription agreement with BHSB, the defendant irrevocably granted to the plaintiff a put option (as defined therein) to require the defendant to purchase up to 500,000 redeemable convertible cumulative preference shares of RM1 each in BHSB held by the plaintiff (the option shares) from the plaintiff at the aggregate of the subscription price of RM5m and an additional 25%pa of the subscription price (which is inclusive of the cumulative dividend of 10%pa) (the put option price) on the terms and conditions set out therein;

(b) the put option may be exercised by the plaintiff at any time during the put option period (as defined therein) by serving a notice in writing on the defendant (the put option notice);

(c) upon service of the put option notice by the plaintiff, the defendant shall purchase from the plaintiff, free from all liens, charges and other encumbrances in favour of the plaintiff and with all rights attaching thereto, all the option shares specified in the put option notice at the put option price;

(d) that upon the put option notice being duly served on the defendant, completion of the sale and purchase of the option shares shall take place on the completion date (as therein defined); and

(e) that if the defendant were to default in making payment of causing payment to be made of any sum payable by it under the put and call option agreement, the defendant shall pay to the plaintiff the amount due together with interest from the date such payment is due until the date of actual payment (as well after as before judgment) at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry.

[8] On or about 4 January 2011, the plaintiff exercised the put option by serving a notice in writing of such exercise on the defendant in accordance with the provisions of the put and call option agreement. By way of the put option notice dated 4 January 2011 (the put option notice), the plaintiff informed the defendant that he was required to purchase the option shares from the plaintiff at the put option price of RM9,835,349 wherein completion of the purchase was to take place on 25 January 2011.

[9] However, the defendant failed to purchase the option shares from the plaintiff. Thus the plaintiff filed this proceedings. The plaintiff's statement of claim dated 29 December 2016 seeks for the following reliefs:

(a) an order that the defendant specifically perform its obligation to purchase the option shares in accordance with the terms of the put and call option agreement within seven days hereof;

(b) alternatively to para (a) above, damages in the sum of RM9,835,349 in lieu of specific performance;

(c) interest on the damages in para (b) above, at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry from 26 January 2011 until full settlement thereof;

(d) further or alternatively to paras (a) and (b) above, damages for breach of the put and call option agreement;

(e) interest on the damages in para (d) above, at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry from 26 January 2011 until full settlement thereof;

(f) that a date be fixed by this honourable court for damages to be assessed;

(g) costs; and

(h) such further or other relief as this honourable court thinks just and proper.

[10] Subsequently the plaintiff filed a notice of application dated 10 April 2017 (encl 6) pursuant to O 81 r 1 of the RoC 2012 seeking for the prayers as stated in its statement of claim. The said notice of application was subsequently amended vide the court order dated 20 July 2017. By the amendment the plaintiff seeks for an order that the defendant specifically perform its obligation to purchase the option shares within fourteen days from the date of the court order as opposed to seven days in the initial notice of application.

THE PLAINTIFF'S CASE

[11] By the affidavit in support of the said application, the plaintiff through its director Foo Wei Hoong, deposed as follows:

(a) vide the subscription agreement (exh FWH1 encl 7) the plaintiff had subscribed for the subscription shares at the subscription price making the plaintiff the legal and beneficial owner of the subscription shares. The share certificate No 001P (of the subscription shares) in the name of the plaintiff is marked as exh FWH3 of encl 7;

(b) the plaintiff, the defendant, Leong Soek Fun and BHSB entered into the shareholders agreements (exh FWH2 encl 7) to regulate the relationship inter se as the shareholders of BHSB;

(c) pursuant to the put and call option agreement (exh FWH4 encl 7) the plaintiff served the put option notice (exh FWH6 of encl 7) on the defendant. By the said notice dated 4 January 2011 the plaintiff informed the defendant that he was required to purchase the option shares from the plaintiff at the put option price of RM9,835,349 and that the sale and purchase of the option shares is to be completed by 25 January 2011;

(d) the put option notice was issued pursuant to cl 3.1 of the put and call option agreement. At the date of the issuance of the put option notice:

(i) the defendant had not exercised the call option under the put and call option agreement; and

(ii) no notice had been given by BHSB to redeem the 500,000 redeemable convertible cumulative preference shares in the share

capital of BHSB held by the plaintiff in accordance with the terms of the subscription agreement;

(e) the defendant acknowledged receipt of the put option notice vide letter dated 27 January 2011 where the defendant informed the plaintiff that the company was experiencing financial difficulties due to the economic downturn. Despite reminders by the plaintiff, the defendant failed to purchase the option shares at the put option price in accordance with the put and call option agreement;

(f) the defendant is, and was at the commencement of this action is justly and truly indebted to the plaintiff in the sum RM9,835,349 being monies owing pursuant to the defendant's obligations under the put and call option agreement together with interest at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry from 26 January 2011 until full settlement;

(g) the prevailing fixed deposit rate in the banking industry at present (the time the notice of application under O 81 r 1 of the RoC 2012 filed) ranges from 2.7%pa to 4.3%pa depending on amongst others, the tenure of the deposit. In this case the plaintiff claims interest at the rate of 3.2%pa against the defendant;

(h) cl 5.4 of the put and call option agreement enable the plaintiff to claim interest at the rate per annum equivalent to the prevailing fixed deposit rate. The rate 3.2%pa is a median of the average fixed deposit rates of commercial banks in Malaysia from 2011 to the present day based on information published by Bank Negara Malaysia as can be seen at exh FWH8 encl 7;

(i) the plaintiff has been at all material times and is ready and willing to perform its obligations under the put and call option agreement; and

(j) the plaintiff verily believe the defendant has no defence and the defence raised in the statement of defence are not sustainable.

[12] The subscription price of the subscription shares at RM5m was agreed by the parties and set out in the subscription agreement. The put option price which was agreed by the parties under the put and call option agreement was the aggregate of the subscription price (which is inclusive of the cumulative dividend of 10%pa).

[13] The financial situation of BHSB and/or its subsidiaries and the suits brought by the third party creditors against the said companies are not relevant in the context of the plaintiff's claim herein and do not release the defendant from the performance of his obligations under the put and call option agreement.

THE DEFENDANT'S CASE

[14] The defendant admits executing the subscription agreement and the shareholders agreement. However the defendant resists the plaintiff's application for specific performance.

[15] As regards to the put and call option agreement, the defendant's objection is premised on the following grounds:

(a) the put option price is unjust, excessive and oppressive;

(b) the put option notice and the execution of the put and call option agreement by the plaintiff is unjust and oppressive;

(c) the put option notice dated 4 January 2011 was issued about six years ago and it is only now the plaintiff scrambles for a judgment against the defendant. In its statement of defence the defendant deny receiving the put option notice;

(d) the exercise of the put option is subject to the occurrence of the events stipulated in cl 6 of the put and call option agreement and not at any time during the put option period as contended by the plaintiff. Clause 6 refers to events of default. Since there is no default on the part of the defendant and/or BHSB, the plaintiff is not entitled to exercise the put option;

(e) the plaintiff did not offer any explanation for the exercise of the put option;

(f) there is no basis for the plaintiff to impose the high fixed deposit rate. The plaintiff is also not entitle to claim any interest. The interest rate at 3.2%pa is excessive in view of the fixed deposit rate imposed at the same time; and

(g) the plaintiff disputes the sum RM9,835,349 stated in the put option notice. There is double calculation on the option price of the option shares without any justification.

[16] The defendant had informed the plaintiff that he is not able to honour the terms of the put and call option agreement due to BHSB's financial position which is affected as a result of the ongoing dispute between the defendant and BHSB with Malaysian Development Venture Bhd ('MDVB').

[17] BHSB and its subsidiary BTS Tools Manufacturing (M) Sdn Bhd ('BTS') is in the business of 'cutting-tools' which requires sophisticated computerised machines specially designed for BHSB and BTS which has its main business network in Bangkok, Thailand. In 2011 the said machines were damaged due to a severe flood in Bangkok. For purpose of repairing the

machines the defendant has applied for insurance money from AXA Insurance Public Co Ltd Thailand. However the machines could not be repaired because the defendant's claim for insurance was impeded by MDVB. As a result, the business operations of BHSB and BTS was paralysed.

[18] The defendant, BHSB and BTS are currently engaged in litigation with not only MDVB but also with other creditors. The plaintiff is aware of the situation. As a shareholder of BHSB, the plaintiff has a social obligation to support BHSB to continue with its business operation and not to initiate this proceeding against the defendant which is oppressive.

THE LAW

[19] The provision of O 81 of the RoC 2012 reads as follows:

81 Actions for specific performance, summary judgment

1 Application by plaintiff for summary judgment (O 81 r 1)

(1) In an action begun by writ endorsed with a claim —

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;

(b) for rescission of such an agreement; or

(c) for the forfeiture or return of any deposit made under such an agreement,

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has entered an appearance in the action.

2 Manner in which application under rule 1 shall be made (O 81 r 2)

(1) An application under rule 1 shall be made by notice of application supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action.

(2) The notice of application shall set out or have attached thereto minutes of the judgment sought by the plaintiff.

(3) The notice of application, a copy of the affidavit in support and of any exhibit referred to therein shall be served on the defendant within fourteen days from the date of issue of the notice of application.

2A Affidavits (O 81 r 2A)

Order 32, rule 13(2) shall apply mutatis mutandis to all affidavits in respect of an application under this Order.

3 Judgment for plaintiff (O 81 r 3)

Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

4 Leave to defend (O 81 r 4)

(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) The Court may give a defendant against whom such an application is made leave to defend the action either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(3) On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity —

(a) to produce any document;

(b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.

5 Directions (O 81 r 5)

Where the Court orders that a defendant have leave to defend the action, the Court shall give directions as to the further conduct of action.

6 Costs (O 81 r 6)

If the plaintiff makes an application under rule 1 where the case is not within this Order, or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 59, and, in particular, to rule 4(1) thereof, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

7 Setting aside judgment (O 81 r 7)

Any judgment given against a defendant who does not appear at the hearing of an application under rule 1 may be set aside or varied by the Court on such terms as it thinks just.

[20] An application under O 81 of the RoC 2012 is similar to an application

under O 14 for a summary judgment. It is trite law that the court would exercise its discretion for summary judgment only in plain and obvious cases, ie, that there is no bona fide defence (*Tan Yaw Soon & Anor v Teng Sian Loong Enterprise Sdn Bhd* [1994] 1 MLJ 239; [1994] 2 CLJ 301). In *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585; [2008] 2 CLJ 303 the Court of Appeal laid out the principles and procedure applicable in an application pursuant to O 81 of the RoC 2012:

> [46] The plaintiff in a summary judgment application first needs to establish a prima facie case that 'he is entitled to judgment'. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220; [1984] 1 CLJ Rep 283 per Seah FJ). 'Ought' in O 81 r 3, is an expression of a strong probability. In other words, the issue in dispute must be critically investigated and be determined as genuine. This is what a defendant needs to prove to be entitled to a trial of that disputed issue.
>
> [47] A judge in allowing for a summary judgment under O 81 of the RHC 1980, does so in the exercise of his discretionary jurisdiction. He may enter a judgment for the plaintiff or allow leave to defend the action. If an appellate court finds that this discretion had been judicially exercised in the sense that he had properly evaluated the facts to find no arguable case, and had not been wrong in law or erred in principle, then the judge's decision should not be disturbed here (see *Wee Choo Keong v MBf Holdings Bhd & Anor And Another Appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210; *Eng Mee Yong & Ors v Letchumanan*).

FINDINGS OF THE COURT

[21] The plaintiff's cause of action against the defendant is contractual in nature. It is premised on the agreements executed by the parties, namely, the subscription agreements, shareholders agreement and most significantly the put and call option agreement.

[22] Thus the plaintiff in the instant case must satisfy the court that there is a prima facie case for the plaintiff to be entitled to judgment in accordance with the terms and conditions of the put and call option agreement.

[23] The plaintiff's affidavit in support of the O 81 r 1 of the RoC 2012 was affirmed by its director who has verified the facts which forms the basis of the plaintiff's claim against the defendant. The relevant provisions under the put and call option agreement are identified and a copy of the said agreement is produced and marked as exh FWH4 of encl 7. Another vital document which is the put option Notice is also produced and marked exh FWH6 of encl 7. The deponent has clearly states his belief that the defendant has no defence to the claim made against him by the plaintiff.

[24] The plaintiff's notice of application encl 18 has also set out or have attached thereto minutes of the judgment sought by the plaintiff. The same minutes was also attached to the initial notice of application encl 6.

[25] As regards to service of the notice of application on the defendant within fourteen days from the date of the issuance of the notice of application, the defendant did not raise any issue of non-compliance in his pleadings and affidavit. As such the service requirement is deemed complied.

[26] Thus the plaintiff has fulfilled the requirement stipulated under O 81 r 1(2) of the RoC 2012.

[27] It is therefore incumbent upon the defendant to prove that there are bona fide triable issues and that a trial ought to be carried out to determine the triable issues. The issues raised by the defendant and the finding of this court in respect of such issues are discussed below.

Whether the exercise of the put option by the plaintiff is in accordance with the terms and conditions of the put and call option agreement

[28] On 4 January 2011 the plaintiff exercised the put option by serving a notice in writing on the defendant. The written put option notice states as follows:

> 4th January 2011
>
> Mr Lim Thiam Chye
>
> No 8, Jalan Teratai 1/1
>
> Amanjaya
>
> 08000 Sungai Petani
>
> Dear Sir,
>
> PUT AND CALL OPTION AGREEMENT RELATING TO THE OPTION SHARES OF BTS HOLDINGS (M) SDN BHD BETWEEN LIM THIAM CHYE (NRIC NO 660517-07-5077) AND MIDF AMANAH VENTURES SDN BHD (COMPANY NO 205310-W)
>
> We refer to the above and the put option granted by you to us in relation to the abovementioned shares.
>
> Terms defined in the put and call option agreement dated 13th March 2007 shall have the same meaning herein.
>
> We hereby give you notice that we require you to purchase from us in accordance with the terms and conditions of the put and call option agreement of 13th March 2007, the 500,000 Redeemable Convertible Cumulative Preference Shares

('RCCPS'), being the Option Shares on the Completion Date, which shall be 25th January 2011, at the aggregate Put Option Price of RM9,835,349.

The breakdown of Put Option Price is as follows:

Details		***RM***
(a)	*500,000 RCCPS at RM10.00 each*	*5,000,000*
(b)	*15% per annum on RM5,000,000 from 13th March 2007 till 25th January 2011**	*2,901,210*
(c)	*10% cumulative dividend per annum on RM5,000,000 from 13th March 2007 till 25th January 2011**	*1,934,140*
		4,835,349
*Total repayment amount as at 25th January 2011**		*9,835,349*

* Completion date (ie 21 days from this put option notice dated 4th January 2011)

Thank you

Yours faithfully.

MIDF AMANAH VENTURES SDN BHD

sgd

LOY TECK WOOI

Designated Officer

[29] Under the put and call option agreement the plaintiff's right to exercise the put option granted to it by the defendant is subject to the terms and conditions of the said agreement which will be discussed below.

Whether the put option was exercised within the put option period

[30] It is to be noted the above issue relating to the put option notice was not specifically pleaded by the defendant. The court invited the parties to submit on this issue as the court need to be sure that the put option notice was exercised within the put option period.

[31] Clause 3.1 of the put and call option agreement provides:

> 3.1 Subject to Clause 6 of the Agreement and unless the Promoter has exercised the Call Option and completion has taken place in accordance with Clause 3 of this Agreement, the put option may be exercised by MAVSB at any time during the put option Period by serving a notice in writing to the Promoter, such notice to be served at any time during the put option Period and to be in or substantially in the form set out in Schedule I.
>
> ...
>
> 3.3 The Promoter agrees that he shall upon service of the put option Notice of

MAVSB, purchase from MAVSB, free from all liens, charges and other encumbrances in favour of MAVSB (but otherwise without any warranty or representation) and with all rights attaching thereto, all the Option Shares specified in the put option Notice at the put option Price.

Subject to Clause 6 of this Agreement, the Call Option may be exercised by the Promoter at any time during the Call Option Period.

[32] Pursuant to cl 3.1, the plaintiff may exercise the put option subject to:

(a) cl 6. This particular clause sets out certain triggering events the occurrence of which would entitle the plaintiff to exercise the put option; and

(b) the defendant has not exercised the call option wherein completion has taken place.

[33] Based on the facts adduced there is no occurrence of triggering events under cl 6 and that the defendant has not exercise its right for a call option. As such the plaintiff is at liberty to exercise its right for a put option under cl 3.1 of the put and call option agreement. Under the circumstances, the defendant's contention that the exercise of the put option by the plaintiff is subject to the occurrence of an event of default is a misconstruction. Also, contrary to the defendant's insistence, the said cl 3.1 does not require the plaintiff to justify its exercise of the put option.

[34] Be that as it may, the said cl 3.1 provides further conditions, that is, the put option may only be exercised:

(a) during the put option period;

(b) a notice in writing to that effect must be served on the defendant at any time during the put option period; and

(c) the notice is to be in or substantially in the form set out in Schedule 1 of the put and call option agreement.

[35] The put option period is defined as:

'Put Option Period' subject to Clause 3.2 and clause 6 of this Agreement, the period of three (3) months commencing:

(a) in the case where no notice is given by BHSB to redeem the RCCPS in accordance with the terms of the subscription agreement, on the expiry of forty three (43) months from the date of the subscription agreement;

(b) on the expiry of forty four (44) months from the date of the subscription agreement if any of the RCCPS is not redeemed notwithstanding that BHSB has given the notice to redeem the RCCPS pursuant to the terms of the subscription agreement;

[36] Since no triggering events in the context of cl 6 has occurred and that BHSB has not given any notice to redeem the redeemable convertible cumulative preference shares in the share capital of BHSB held by the plaintiff, the put option period which is applicable is the period as computed in para (a) of the definition of put option period.

[37] The put option period is therefore a three-month period and it commences on the expiry of 43 months from the date of the subscription agreement. Thus the computation of the put option period based on the said formula is as follows:

Date of subscription agreement which is 13 March 2007
+
43 months which expires on 12 October 2010
+
Three months which commence on 13 October 2010 and expires on 12 January 2011

Based on the above computation the period within which the plaintiff is to exercise the put option is any time between 13 October 2010–12 January 2011.

[38] The written put option notice was issued by the plaintiff on 4 January 2011. As such it was well within the three-month put option period.

[39] The defendant concedes the put option period is between 13 October 2010–12 January 2011 and that the put option notice was issued within the put option period. However the defendant contends the plaintiff has no right to enforce the put option notice after the expiry of the put option period. In other words the plaintiff cannot, from 13 January 2011 onwards demand the defendant to purchase the option shares.

[40] With respect, such contention is untenable. Firstly, there is no provision in the put and call option agreement which requires the put option notice to be enforced within the put option period. All that is required of the plaintiff or the defendant for that matter if either party desire to exercise the put or call option granted to them, is by serving a written notice which is to be substantially in Schedule 1 of such desire on the other party within the specific put option period or call option period as the case may be. The provision in cl 3 is very clear, as such it must be given its literal meaning.

[41] Secondly, it relates to the interpretation of the put and call option agreement. In this respect reference is made to the case of *The Government of Malaysia v Imej Warisan Sdn Bhd* [2018] 2 MLJ 791; [2017] 1 LNS 1914,

where the Court of Appeal had this to say about the interpretation of a particular provision in a design and build contract:

> [24] It has often been said that where the court is called upon to interpret a contract, it will do so in a sensible fashion (see *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37). In this connection, it is also instructive to consider Lord Steyn's statement in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:
>
> > In determining the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial transaction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic.

[42] The subscription agreement, shareholders agreement and in particular the put and call option agreement are all commercial contracts. By the subscription agreement dated 13 March 2007, the plaintiff has agreed to invest in BHSB by subscribing for 500,000 redeemable convertible cumulative preference shares of RM1 each to be issued by BHSB, making the aggregate subscription price RM5m. In consideration thereto, the defendant agreed to grant to the plaintiff a put option requiring the defendant to purchase the option shares during the put option period. The defendant is also granted the right for a call option where the defendant may require the plaintiff to purchase the option shares during the call option period.

[43] As such, the put and call option agreement must be interpreted in a sensible commercial manner as to give effect to the intention of the parties. To interpret the put option in the manner contended by the defendant would lead to an unreasonable result. This is because the defendant, against whom the put option notice was duly served in accordance with the provisions of the put and call option agreement, can deliberately and intentionally refuse, fail and neglect to honour his part of the bargain to purchase the option shares within the put option period and after the expiry of such period use this as a sword against the plaintiff. This absurd situation and result certainly cannot be the intention of the parties.

[44] In this respect what was said in the English case *L Schuler A G v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39; [1974] AC 235 is of significant relevance:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that

the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

[45] Another reason why the defendant's contention is a fallacy is this. The put and call option agreement has clearly provided for the completion of the sale and purchase of the option shares. Clause 5 states:

> 5. COMPLETION
>
> 5.1 Upon the Option Notice being duly served on the Promoter of MAVSB, as the case may be in accordance with Clauses 3 and 3B above, completion of the sale and purchase of the Option Shares shall take place on the Completion Date.
>
> 5.2 On the Completion Date:–
>
> (a) The Promoter shall pay or cause to be paid to MAVSB the put option Price or Call Option Price, as the case may be, for the Option Shares in Ringgit Malaysia (free from any set-offs or counter-claim and without any deductions for tax or otherwise) and all costs, charges and expenses incurred in relation thereto ('Settlement Amount') by banker's draft or bank transfer to such bank account in Malaysia as MAVSB shall specify in writing to the Promoter;
>
> (b) MAVSB shall deliver total Promoter a duly executed share transfer from (Form 32A) in favour of the Promoter.

[46] The said agreement has also provided for the definition of 'completion date' which is as follows:

> 'Completion Date' the date falling within twenty one (21) days from the date the Option Notice is served on the Promoter (both dates inclusive) provided that if that date is not a Business Day, the Completion Date shall be immediately preceding Business Day;

[47] Thus by the put and call option agreement the defendant has agreed and therefore obliged to purchase and pay for the option shares at the put option price by 25 January 2011 which is well after the expiry of the put option period. As such the defendant's contention that the plaintiff is not entitled to execute the put option notice after the expiry of the put option period is a non-issue at all. This is because by the provisions of the put and call option agreement itself, parties had contemplated that the completion of the sale and purchase of the option shares may occur beyond the put option period or the call option period as the case may be. As such the defendant's contention is purely devoid of merits. In this respect reference is made to the case of *Perbadanan Nasional Berhad v Arif bin Awang* [2011] MLJU 125 where the court rejected the defendant's argument that the plaintiff has waived its right to require the defendant to purchase the option shares because the call option period has expired. This is because even though the call option period has

expired the put option was duly exercised within the call period.

[48] If the defendant's contention is to be adopted, the defendant himself ought to have purchased the option shares and pay the put option price between the period of 13 October 2010 and 12 January 2011. However vide letter dated 27 January 2011, not only the defendant did not dispute the sum claim and did not pay the put option price, he actually sought for the plaintiff's patience and wait for BTS to recover in another two years, presumably to enable him to purchase the option shares and pay for the subscription shares in another two years which is long after the expiry of the put option period!.

[49] In his statement of defence, the defendant denies having ever received the put option notice (see para 10 of the statement of defence). However in its affidavit opposing the plaintiff's application for specific performance the defendant took a different stand. The denial of receipt of the put option notice was abandoned and replaced with the issue that the put option notice is unjust and oppressive. The change in stand is obvious as the defendant is compelled to do so. This is because the defendant had in fact acknowledged the receipt of the put option notice vide his letter dated 27 January 2011. The said letter is produced by the plaintiff and marked as exh FWH6 of encl 7. The defendant's letter reads as follows:

> 27 January 2011
>
> Board of Directors
>
> MIDF Amanah Venture Sdn Bhd
>
> Level 20, Menara MIDF
>
> Jalan Raja Chulan
>
> 50200 Kuala Lumpur
>
> Attn: Mr Loy Teck Wooi (Designated Officer)
>
> Dear Sirs,
>
> PUT AND CALL OPTION AGREEMENT RELATING TO THE OPTION SHARES OF BTS HOLDINGS (M) SDN. BHD. BETWEEN LIM THIAM CHYE (NRIC NO 660517-07-5077) AND MIDF AMANAH VENTURES SDN BHD (COMPANY NO 205310-W)
>
> Refer to your Put Option Notice given on 4th January 2011 to purchase the 500,000 RCCPS, being the Option Shares on the Completion Date which is on 25 January 2011, at the aggregate of RM9,835,349.
>
> Please note that BTS Management are fully aware about the Terms defined in the put and call option agreement dated 13*th* March 2007 and wish could honour the terms accordingly.
>
> Unfortunately, BTS currently are facing tight financial situation due to the impact

of previous years economy downturn (from end 2008 until 2010), which lead to deteriorate in term of sales turnover.

Year 2009 and 2010 we lost more than 50% of our sales turnover and 2011 is our recovery year.

BTS's management hope that MIDF's top management can be patient and give BTS a chance to recover in another 2 years time as now our new project for Medical Tools is on progress and we hope to be listed by end 2013, which is your exit point.

Please let me brief you and your top management by formal presentation after this CNY, most probably by end February or early March 2011 on our planning so that we can discuss further.

Thank you,

Yours truly,

sgd

Lim Thiam Chye

Group CFO BHSB

[50] The other requirement which the plaintiff need to comply for purpose of exercising the put option granted to it is that the format of the written notice of the put option must be in or substantially in Schedule 1 — Form of put option notice of the put and call option agreement. My perusal of Schedule 1 and the put option notice dated 4 January 2011 shows the put option notice is substantially in the form as set out in Schedule 1 of the put and call option agreement. The defendant also concede the put option notice was in compliance with the said Schedule 1.

Whether the sum RM9,835,349 is in accordance with the put and call option agreement

[51] The defendant disputed the sum RM9,835,349 on the ground that it is excessive and the fixed deposit rate fixed at 3.2% is high.

[52] Clause 4 of the put and call option agreement provides as follows:

4.1 The put option Price for the Option Shares shall be the aggregate of the subscription price of Ringgit Malaysia Five Million (RM5,000,000.00) and an additional 25% per annum of the subscription price (which is inclusive of the cumulative dividend of 10% per annum)

4.2 The Call Option Price for the Option Shares shall be the aggregate of the subscription price of Ringgit Malaysia Five Million (RM5,000,000.00) and an additional 25% per annum of the subscription price (which is inclusive of the cumulative dividend of 10% per annum).

[53] Thus in so far as the option price is concerned, be it put option price or call option price, the formula for its calculation is the same. This means if the defendant were to exercise the call option he is entitled to require the plaintiff to purchase the option shares at the option price which is to be calculated based on the formula.

[54] Based on cl 4.1 of the put and call option agreement the put option price consists of the aggregate of two elements, that is:

(a) the put option price of the option shares; and

(b) 25%pa of the option price which is inclusive of the cumulative dividend of 10%pa.

In numbers the above is translated as follows (as stated in the put option notice):

Details	***RM***
(a) 500,000 of redeemable convertible cumulative preference shares at RM10.00 each	*5,000,000*
*(b) 15% per annum on RM5,000,000 from 13th March 2007 till 25th January 2011**	*2,901,210*
*(c) 10% cumulative dividend per annum on RM5,000,000 from 13th March 2007 till 25th January 2011**	*1,934,140*
	4,835,349
*Total repayment amount as at 25th January 2011**	*9,835,349*

* Completion date (ie 21 days from this put option notice dated 4th January 2011)

[55] As the determination of the put option price has been mutually pre-determined by the plaintiff and the defendant, the defendant cannot now claim the RM9,835,349 which is calculated on the basis of the pre-determined formula is excessive. In fact in his letter dated 17 July 2011 which is in response to the put option notice served on him, the defendant did not at any point in time complained the sum is excessive. In fact, from the letter, it is abundantly clear that the defendant is fully aware of the terms of the put and call option agreement. It is pertinent to note that the evidence before the court shows, for about four years after the execution of the put and call option agreement, not a single word from the defendant about the put option notice or the computation of the put option price being unjust and oppressive. Only when this proceeding is initiated against the defendant for failure to perform its contractual obligations did the issue of unjust and oppressive surfaced.

[56] Obviously the contemporary documents and conduct of the defendant

is inconsistent with the defendant's claim in regards to the excessiveness of the sum claimed against him. If indeed the defendant feels he is being oppressed by the very terms that he had earlier agreed, the defendant ought to have proposed to the plaintiff for the formula of the calculation to be reviewed. The defendant has not done so, most probably due to the reason that the same formula is also applicable in the event the defendant exercise its right for a call option and the defendant stands to benefit from it. I am of the considered view the issue of unjust and oppressive and the sum RM9,835,349 being excessive is without basis. It is just unfortunate that the formula which the defendant has consented to in 2007 is now adversely against him. That is the commercial risk that the defendant has to swallow as a result of the plaintiff's exercising its put option in accordance with the put and call option agreement.

[57] The defendant complained the fixed deposit rate at 3.2% sought to be imposed on the damages for the defendant's breach of the put and call option agreement is high. As stated in para 11 above the plaintiff explains in its affidavit encl 10 the fixed deposit rate at 3.2% is based on cll 5.3 and 5.4 of the put and call option agreement. The provisions states as follows:

> 5.3 Breach
>
> (a) In the event that the Promoter fails to make the payment of the Settlement Amount on the Completion Date, MAVSB shall have the right to deal with the Option Shares in any manner as it deems fit.
>
> 5.4 Default Interest
>
> If the Promoter were to default in making payment or causing payment to be made of any sum payable by it under this Agreement (whether determined by this Agreement or pursuant to any order of court or otherwise), the Promoter shall pay to MAVSB the amount due together with interest from the date when such payment is due until the date of actual payment (as well after as before judgment) at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry.

[58] The above provision enables the plaintiff to ask for default interest, that is, interest imposed due to the defendant's failure to pay the amount demanded as stated in the put option notice. It further provides that the interest is to be imposed for a duration commencing from the date the amount ought to have been paid until the amount is actually paid. By the said provision too, the parties has contractually agreed that the interest rate is based on the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry.

[59] The plaintiff has produced a list setting out the current fixed deposit rates of banks in Malaysia which is marked as exh FWH5 of encl 7 which shows the rate ranges from 2.7%pa to 4.3% depending on, among others, the tenure of the deposit. Besides that, the plaintiff has also produced a list setting out the

average fixed deposit rates of commercial banks in Malaysia from 2011 to February 2017 obtained from Bank Negara Malaysia — exh FWH8 of encl 8. The rate 3.2%pa is a median of the average fixed deposit rates of commercial banks for the said period.

[60] The defendant's complaint that the rate 3.2%pa is high is not supported by any facts or evidence. In the absence of such evidence there is no reason for this court to doubt the rate obtained from the regulatory body. After all the formula to determine the rate has already been agreed by the parties.

[61] However I am of the view that the plaintiff is not entitle to impose interest at the rate of 3.2% on the sum RM9,835,349 as prayed in their notice of application encl 18. This is because based on the computation of the put option price as stated in cl 4.1, such computation is inclusive of 25% dividend on the subscription price. I am of the view it would be unjust to the defendant if default interest is imposed on the sum RM9,835,349 in addition to the 25% dividend imposed on the subscription price of RM5m.

[62] It is clear from the facts that the defendant has breached its obligations under the put and call option agreement when it failed to purchase and pay for the option shares at the option shares price. Under s 18(1) of the Specific Relief Act 1950, a party claiming for specific performance may also ask for compensation its breach, either in addition to, or in substitution for, its performance (see also in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; *Lee Hoy & Anor v Chen Chi* [1971] 1 MLJ 76). I allowed the plaintiff's claim for damages subject to it being assessed by this court. The interest rate at 3.2%pa ought to be imposed on the damages suffered as a result of the defendant's breach of the put and call option agreement.

[63] Besides the issues raised in relation to the terms and conditions of the put and call option agreement, the defendant has made reference to the financial position of BHSB and BTS. In this respect I am in agreement with the plaintiff that such issues are not relevant to the plaintiff's claim for specific performance against the defendant. The defendant is being sued in his personal capacity and not the company BHSB where he is the Group CEO BHSB. As such the financial standing of BHSB is not an issue, what more triable issue for purpose of the plaintiff's application under O 81 r 1 of the RoC 2012.

CONCLUSION

[64] Premised on the aforesaid reasons I am of the view that the defendant has failed to discharge his burden to raise bona fide triable issue which warrant

a full trial. Accordingly I allowed the plaintiff's notice of application encl 18 on the following terms:

(a) the defendant specifically perform its obligation to purchase the option shares, namely, the 500,000 redeemable convertible cumulative preference shares of RM1 each held by the plaintiff in BHSB at the put option price as stated in the put option notice dated 4 January 2011 in accordance with the terms of the put and call option agreement dated 13 March 2007 within 14 days hereof;

(b) the defendant pays damages to be assessed for breach of the said put and call option agreement;

(c) the defendant pays interest on the said damages at the rate of 3.2%pa, being equivalent to the prevailing fixed deposit rate in the banking industry from 26 January 2011 until full settlement thereof;

(d) the plaintiff at liberty to apply; and

(e) costs of RM6,000 to the plaintiff.

The plaintiff's application allowed with costs of RM6,000.

Reported by Mohd Kamarul Anwar